

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

JUANA P.,

Claimant,

OAH No. N 2006051009

vs.

SAN ANDREAS REGIONAL CENTER,

Service Agency.

DECISION

This matter was heard before Michael C. Cohn, Administrative Law Judge, State of California, Office of Administrative Hearings, in Salinas, California, on July 26, 2006.

Claimant was present and was represented by her mother and authorized representative, Maria P.

Jacques F. Maitre, Executive Director's Designee for Fair Hearings, represented the service agency.

The matter was submitted for decision on July 26, 2006.

ISSUE

The issue is whether claimant is eligible for services under the Lanterman Act due to either mental retardation or cerebral palsy.

FACTUAL FINDINGS

1. Claimant is 20 years old. She has a diagnosis of cerebral palsy with spastic diplegia. At the suggestion of claimant's school, her mother sought an eligibility determination by the service agency on the basis of cerebral palsy and mental retardation.

2. Claimant was born in Mexico. Her family moved to the United States in 2000, when claimant was about 15. Later that year claimant, who had never attended school in Mexico, enrolled at Salinas High School. She was referred for a psycho-educational evaluation by school psychologist Mary von Witzleben, Ph.D.

3. In December 2000, Dr. von Witzleben administered the Leiter International Performance Scale (Leiter-R) to assess claimant's cognitive ability. This test, which is designed to measure nonverbal intellectual ability, was chosen because claimant spoke little English and because of "her limited cognitive functioning." The test produced a full scale IQ score of 37, which Dr. von Witzleben characterized as falling in the "significantly delayed" range. The Vineland Adaptive Behavior Scales were administered with claimant's mother as the reporter. These produced a composite score of 32, with subdomain scores of 24 in communication, 60 in socialization, and below 20 in daily living, all of which Dr. von Witzleben characterized as being in the "significantly delayed" range and consistent with claimant's estimated ability levels. Dr. von Witzleben noted that claimant had "a number of strengths. She is able to communicate verbally with appropriate affect. She can identify colors and simple shapes, count to 20, differentiate between large and small, and match pictures." She also noted that claimant "has a great desire to learn." Claimant thereafter received special education services from the Salinas Union High School District, although the precise nature of her classes and the services she received were not established.

4. A triennial re-evaluation was done in November 2003, at which time claimant was 18 years old and in the Monterey County Office of Education's (MCOE) severely disabled program at North Salinas High School. The re-evaluation was done by school psychologist Deidra Lunn, who noted the Leiter-R and Vineland scores attained three years earlier but did not administer any follow-up testing. Lunn also noted that claimant "has an orthopedic impairment" and stated that she "has been described as very social, having a positive attitude, and strongly motivated to do her best. She speaks in sentence format in Spanish, which is her native language. She is said to be showing progress in reading community sign words. . . . She is said to be developing a vocabulary in English." Based upon the foregoing findings, Lunn concluded, "[Claimant] continues to be eligible for special education services and the provision of those services is warranted."

5. An Individualized Education Program (IEP) for claimant was completed by the Monterey County SELPA in November 2005. Claimant was then participating in MCOE's Northminster Transition Program. Claimant is still in that program and is expected to continue in it until June 2007. The IEP form contains an "Eligibility" box in which the individual's "primary disability" is to be indicated by checking one (and only one) of various listed disabilities. Claimant's primary disability is listed as "orthopedic impairment," not "mental retardation."

Most of the comments on the IEP are by claimant's teacher in the Northminster program, Nita Farrell. In her annual review, Farrell wrote:

The focus of our class as a transitional unit is acquisition of job skills and appropriate social interaction. [Claimant's] academic skills remain at an early elementary level because of her lack of schooling in Mexico and the problems she faces as an English Language learner. She is obviously a capable person and tries very hard to do her best in all situations. She has made excellent progress in understanding and using English in the classroom and at our community job sites. . . . We . . . love to watch her with the other students as she helps and mentors them.

. . . .

We worried about [claimant's] transition to our program from the high school because of the large group of friends that she would be leaving behind but we have found her to be very adaptable and friendly and a wonderful addition to our classroom.

. . . .

[Claimant] is able to write her first and last names and seems to have fair fine motor control for writing and drawing. She has been able to put stickers on books and pamphlets, stamp envelopes, fold letters, put papers together and fold them for official letters, and do many simple office tasks. She moves around the classroom and community with few problems and is able to plan her movements so that she does not run into others or into classroom/community furniture. She is able to walk short distances in the classroom without her crutches and long distances in the community with her crutches. She has learned how to drive the electric wheelchair on long trips in the community and is very careful and aware of others as she uses it.

. . . .

. . . [Claimant] works two mornings a week at WalMart and two mornings a week at Red Cross. At WalMart, [claimant] signs in, checks the register and aisle areas and picks up the items that are out of place. At Red Cross, she signs in and helps out by doing the light office work/volunteer jobs that she is assigned. In both situations, she listens to new instructions and tries to follow them carefully and/or follows the job steps that she has been given previously.

6. Nita Farrell, claimant's teacher at the Northminster Transition Program points out that while claimant has worked successfully at Wal-Mart and the Red Cross,

these were closely supervised positions. The program places students in “workability” positions with a 1 adult:2 student ratio. At Wal-Mart, for instance, claimant and another student from the program worked under the direct supervision of an adult. The students patrolled the store looking for items that were out of place. They were accompanied by an adult who pushed the shopping cart into which the found items were placed. Farrell believes claimant needs this sort of supervision and support in the work environment. She does not see her functioning independently and believes she is most in need of advocacy services. Farrell conceded that claimant’s lack of education has had “a huge impact” on her current abilities.

7. In December 2005, the service agency referred claimant to psychologist Arnold E. Herrera, Ph.D., for an assessment of her level of intellectual and adaptive functioning. Dr. Herrera administered the Wechsler Adult Intelligence Scale – Third Edition (WAIS-III) and the Wide Range Achievement Test – Revision Three (WRAT-3) to claimant. He administered the Vineland, with claimant’s mother as the reporter.

On the WAIS-III, claimant achieved a verbal IQ score of 79, a performance score of 77, and a full scale score of 76. Dr. Herrera indicated these scores “indicated borderline intelligence [but] correcting for limited schooling, she likely retains at least low average intelligence.” He went on to state that, “[This] impression was reinforced by several subtests falling within the average range, for example, Vocabulary and Similarities from the Verbal subscale and Picture Completion and Picture Arrangement from the Performance subscale.” Dr. Herrera also noted that the areas in which claimant was weakest, math and fund of knowledge in the verbal area and “decoding of the type employed in reading and fine motor dexterity” in the nonverbal area, were “consistent with her limited schooling” and “educational issues.” Dr. Herrera found claimant exhibited a number of skills “inconsistent with mental retardation,” such as her “ability to pick out missing visual details and organize pictures to tell a logical story” and “her ability to speak in complex sentences employing a vocabulary that is inconsistent with mental retardation especially considering the fact that she did not have any formal schooling until 15 years of age.” And, Dr. Herrera noted, “[h]er abstract reasoning capacity clearly contraindicated mental retardation. To give the reader a feel for this, she was able to stipulate that a table and chair are both furniture, that work and play are both activities and an egg and a seed are both the start of something.”

On the WRAT-III, claimant achieved reading and arithmetic scores at the second grade level. But Dr. Herrera attributed this to claimant’s limited educational exposure, not a cognitive impairment.

The Vineland produced a composite score of 74 and subdomain scores of 82 in communication, 84 in socialization, and 73 in daily living skills. Dr. Herrera characterized these scores as “mixed but above the delayed range.” The lowest score, in daily living skills, is “low borderline” and reflects “the impact of her orthopedic limitations. Her communication and socialization scores were in the low average range but “would have been higher had she been able to attend school and be out in the community more.”

Dr. Herrera concluded that claimant was neither mentally retarded nor functioning similar to someone with mental retardation. He noted that even with the limitation of not having begun school until age 15, “she performed at the borderline to low average level and . . . some skills such as abstract reasoning reached the average level.” He went on to conclude that, “In the right situation, [claimant] could carry out a number of work activities especially if this were in a setting where Spanish was spoken. As noted, her verbal skills are relatively good. All her limitations can be accounted for by orthopedic factors.”

8. Licensed psychologist Neil Hersh reviewed all of the reports and assessments discussed above. Dr. Hersh concluded that claimant is not mentally retarded. He based this conclusion on a number of factors. First, Dr. Hersh noted the large disparity between the IQ and Vineland scores obtained by Dr. von Witzleben and those obtained by Dr. Herrera five years later. The first scores are so low and out of line with claimant’s current presentation that Dr. Hersh concluded that something is “very wrong” with those scores and they should be disregarded. On the other hand, if those earlier scores are considered valid, then the vast improvement to claimant’s recent scores is “totally inconsistent” with mental retardation; a large improvement in IQ scores is not expected in individuals with cognitive impairments. Dr. Hersh believes that claimant is progressing and that the scores obtained by Dr. Herrera are actually “a low estimate” of claimant’s abilities, in part because her orthopedic impairments negatively impact her psychological testing due to slow response time and motor skill limitations. He expects claimant’s test scores will increase even further over time.

Second, individuals with mental retardation show globally depressed intellectual functions. That is not the case with claimant. While her performance was low in some areas, on the WAIS-III administered by Dr. Herrera she scored in the average range on four of 11 subtests. Third, claimant’s recent Vineland scores show “relatively good adaptation” in two of the three subdomains. The one subdomain in which her score was in the borderline range, daily living skills, is the one most impacted by her orthopedic impairment. Fourth, Dr. Hersh notes that claimant’s recent IEP makes no mention at all of cognitive impairments, instead finding her primary disability to be orthopedic. Finally, in the IEP it is reported that claimant is “obviously a capable person” who helps and mentors other students. Dr. Hersh sees these comments as being atypical for a person with mental retardation.

In Dr. Hersh’s view, claimant seems to be taking advantage of the vocational services that are being provided and is making progress. While he believes claimant is of low-average intelligence and may have some sort of non-verbal learning disability, he does not see her as mentally retarded.

9. Claimant received physical therapy services in Mexico and the United States. In 2001, she underwent surgery for bilateral tendon releases of the hips, knees and ankles. A physical therapy report issued by Monterey County California Children’s Services in February 2002 recorded claimant’s ability to perform activities of daily living:

Independent in moving in bed, moving to sit and moving to stand. Can stand up from floor with minimal assist. Needs minimal assistance to get into shower and bathe. Walks forward independently for up to 10 minutes, . . . She states her fall frequency has decreased to very infrequent falling 1 time in the last 2 months. She can take 10 steps backward slowly and turn right or left, as well as go through doorways. On curbs, she needs minimal assistance. On stairs—supervision is needed.

The report noted claimant used a manual wheelchair, lofstrand crutches, bilateral ankle-foot orthoses and bilateral knee splints. She “does quite well ambulating with her lofstrand crutches bilaterally and has increased her distance, time, and endurance with standing and walking activities.” “[Claimant] is a very motivated girl with potential to keep progressing with continued treatment.”

10. Based upon the 2002 physical therapy report, Lewis Cantor, M.D., a service agency medical consultant, noted that while claimant has “some difficulty walking,” she is “quite functional.” Dr. Cantor concluded that while claimant has cerebral palsy with spastic diplegia, she is not eligible for regional center services “because she does not have functional disabilities in three separate areas as is required.”

11. Claimant testified that she needs to have her mother help her do “personal things” and that she needs someone close by her because she has fallen down. Claimant’s mother testified that she always needs to be close to her daughter because of her lack of strength in her legs and the fear she will fall and hurt herself. She said she helps her daughter go to the bathroom at night and to bathe. She is concerned because claimant cannot read and does not know how to handle money. Claimant’s mother concedes she has been reticent to let her daughter do things more independently because of these fears.

12. In a December 2005 intake assessment, James Collins, the service agency’s district manager of intake services, noted that, “[a]lthough [claimant] can do her self-care independently, she uses help because she does things so slowly.”

LEGAL CONCLUSIONS

1. Under the Lanterman Developmental Disabilities Services Act,¹ the State of California accepts responsibility for persons with developmental disabilities.² As defined in the act, a developmental disability is a disability that originates before age 18, that continues or is expected to continue indefinitely, that constitutes a substantial disability for the individual, and that is attributable to mental retardation, cerebral palsy, epilepsy,

¹ Welfare and Institutions Code section 4500 et seq.

² Welfare and Institutions Code section 4501.

autism or what is commonly known as the “fifth category”: “disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals.”³

2. A diagnosis of mental retardation requires, among other things, a finding that the individual has significantly subaverage intellectual functioning, i.e., an IQ of approximately 70 or below, with an onset before age 18.⁴ Claimant does not have an IQ within that range. Her most recent testing, in December 2005, produced a full scale IQ score of 76, within the borderline range. The opinions of Drs. Herrera and Hersh that these scores actually reflect a low estimate of claimant’s intellectual abilities due to her lack of education are persuasive. These opinions are supported by other skills claimant exhibited, including good vocabulary and abstract reasoning skills, good performance in her vocational training program, and acting as a mentor to other students. All of these things indicate that claimant performs at a cognitive level well above the mentally retarded range. While tests administered soon after claimant arrived in the United States from Mexico produced scores that suggested claimant was functioning at a very low cognitive level, those scores are not consistent with claimant’s current level of functioning. Those earlier scores carry no weight at this point. The evidence failed to establish that claimant is mentally retarded.

3. Although claimant did not seek eligibility for regional center services under the fifth category, a condition closely related to mental retardation or that requires treatment similar to that required for mentally retarded individuals, it is appropriate to consider that possible qualifying condition as well. The evidence failed to establish that claimant qualifies under the fifth category. The court in *Mason v. Office of Administrative Hearings (Inland Regional Center)*, held that, “[t]he fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded.”⁵ Claimant’s condition does bear some similarity to mental retardation in that her cognitive abilities are somewhat impaired. But as stated above, claimant still performs at a cognitive level well above the mentally retarded range. This precludes a finding of fifth category eligibility.

4. It is undisputed that claimant has cerebral palsy, a potentially qualifying condition. But it must also be shown that claimant’s cerebral palsy constitutes a “substantial disability.” Title 17, California Code of Regulations, section 54001, subdivision (a), defines substantial disability as a condition that results in major impairment of cognitive and/or social functioning determined by the existence of significant functional limitations in three or more of the following areas: receptive and expressive language, learning, self-care, mobility, self-direction, capacity for independent living, and economic self-sufficiency.

³ Welfare and Institutions Code section 4512, subdivision (a).

⁴ Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, p. 49.

⁵ *Mason v. Office of Administrative Hearings (Inland Regional Center)* (2001) 89 Cal.App.4th 1119, 1130.

The evidence showed that claimant has some functional limitations in each of the areas listed above. But her limitations in two of the areas, receptive and expressive language and learning, are products of her cognitive limitations, lack of education, and possible learning disability, not of her cerebral palsy. Claimant's limitations in self-care, mobility, self-direction, capacity for independent living, and economic self-sufficiency are, at least in part, products of her cerebral palsy. However, the evidence failed to establish that her functional limitations in any of these areas are "significant." As shown by the physical therapy report, claimant needs only minimal assistance in most activities of daily living, and she has the potential to progress even further. Partly because of her mother's fear that she will injure herself, claimant has not yet been given the chance to explore her full capabilities for independent living and self-direction. Thus, while claimant has some functional limitations, the evidence has failed to establish they rise to the required level of "significant" limitations in at least three of the enumerated areas.

5. While claimant might well benefit from some of the services provided by the service agency, that fact alone is insufficient to find her eligible under the Lanterman Act. Because claimant fails to qualify for services due to mental retardation or cerebral palsy, or under the fifth category, she is not entitled to receive such services.

ORDER

Claimant's appeal of the service agency's denial of eligibility for services under the Lanterman Act is denied. She is not eligible for regional center services.

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.

DATED: _____

MICHAEL C. COHN
Administrative Law Judge
Office of Administrative Hearings